In the Louisville Chancery Court, Kentucky.

F. F. LUCAS *vs.* E. M. BRUCE *et al.*

1. The doctrine of belligerent rights gives no power to the enemy to take with impunity the property of a citizen of an invaded country.
2. The rebel army during their occupation of a portion of the United States are mere trespassers.
3. Therefore the order of a commander of such army, is no defence to a party in an action for taking a third person's goods.
4. Such commander and the person taking in obedience to his orders are joint trespassers.
5. The compulsion that will excuse a trespass must have been an actual force upon the person, and must have continued all the time.
6. The statement in plaintiff's declaration, that he was about to use his property for an unlawful and treasonable purpose, is not a defence in an action against defendant for taking such property and applying it to the same purpose.
7. Where property is taken by a trespasser, and while in his possession is destroyed, under such circumstances that it is a matter of doubt whether it would have been destroyed had it remained in the possession of the rightful owner, the trespasser is liable for the full value.
8. A party is liable for a tort committed by his copartner in connection with the general object of the firm.
9. The Louisville Chancery Court has jurisdiction of torts, but the amount of damages must be settled by a jury.

Bullock & Anderson and *Hon. Joseph R. Underwood*, for plaintiff.

G. A. and *I. Caldwell*, for defendants.

The opinion of the court was delivered, September 9, 1864, by PIRTLE, Chancellor.—The plaintiff, in December 1861, was the owner of a pork-packing establishment in the county of Warren, Kentucky; and he was engaged at that time in curing and packing beef and pork, or just beginning such business for the season. Before this a portion of the rebel army had taken possession of the city of Bowling Green, and were in the military occupation, if not of the whole, of the principal part of the county of Warren. E. M. Bruce & Co., who were not residents of Warren county, but of a different part of the state, came to Bowling Green soon after the rebel army, and proposing to do business in the firm name, E. M. Bruce applied to the plaintiff to rent his establishment for a certain sum, but the plaintiff rejected his offer. He then applied to one W. J. Hardee, who professed to

be a major-general commanding the rebel forces then in that county, and procured from him a written order addressed to the plaintiff requiring him to rent the property aforesaid to the firm of E. M. Bruce & Co., and upon his failure to do so, a forcible possession was given them by the military under the order of said Hardee, that they might prepare pork and beef for this rebel army. And, to serve the said rebel forces, they went on and did so furnish pork and beef accordingly, until the 14th of February, 1862, when on the approach of General O. M. Mitchell, with a division of the army of the United States, Hardee, with the rebel army, fled in confusion; but in the instant of their flight, and while Mitchell's guns were booming across the Barren River, Hardee ordered the pork establishment of the plaintiff to be destroyed by fire, with a large quantity of pork which the said firm of E. M. Bruce & Co. had placed therein, so that the pork might not fall into the hands of the Union army.

This suit is brought to recover the value of the pork-packing establishment at the time of the burning, as well as the rents from the time of the forcible possession, and damages for the displacing of the plaintiff in his business. If this Court of Chancery has any jurisdiction over this matter of tort, it is, of course, by virtue of the statutes of this state. No doubt the statutes do extend to cases of tort, and the court may take jurisdiction, and attach property where the parties cannot be served with the process of a common law court. But I shall not now decide finally the question of jurisdiction in this case, as to the representatives of Armstrong, one of the firm of E. M. Bruce & Co., who has since departed this life.

It is presented as one of the grounds of defence in this case, that Hardee's army of rebels had control of the county of Warren, and had established a *de facto* power excluding the authority *de jure* of Kentucky and of the United States, and that this *de facto* power was part of a government erected by eleven states, and supported by large armies and navies at the time of the order given by said W. J. Hardee, Major-General, to put the said firm in possession, to work for the benefit of said rebel forces. There is no doubt if persons are compelled by a power not to be resisted, and which is immediately applied, they will be excused for what would otherwise be a trespass on their part. But this force must be upon the person, and it must be an actual compulsion that cannot be resisted, and have continued all the time. They must

have joined "*pro timore mortis et recesserunt quam cito potuerunt:*" 4 Blackstone 30; Foster 14, 216. But here was really no force except as against the plaintiff, and this seems to have been invited by the firm of E. M. Bruce & Co. They were not forced, but had the plaintiff forced to give up his property to them.

But it is said that this possession was taken, and this burning of the establishment of the plaintiff was done by orders of the commanding officer of this Southern *de facto* government, and that the defendants must be excused. Had this officer the right to make such an order; or was he, himself, only a wrongdoer and a trespasser? He was an officer of a body of men calling themselves a government; but not acknowledged to be such by any government in the world. They were a band of rebels and marauders, engaged then in the most unjustifiable attack on Kentucky—who had not molested them—only equalled by the barbarous invasion of Holland by Louis XIV. They had no authority themselves, and therefore had none to bestow on any officer to take the possession, and burn the property of a Kentuckian under such a plea as the necessity of war. Indeed, no invader can have such a right, except in the relation he holds to his own government and his responsibility there; no further, and nowhere else. We have heard a good deal said lately about belligerent rights, both out of the courts and in the courts, and we are a little apt to misapply these words. The expression "belligerent rights," has hardly ever, as used by our writers on the law of war, or international law, any reference to the rights between an individual and the forces of either party in the war. The expression generally applies to the two governments at war, and to the other governments of the world which are affected thereby. A policy, founded on benevolence and humanity, compels us when hostilities have become strong, and assumed "right form of war," to call even those engaged in rebellion and insurrection by the softer name of belligerents, and treat them as having belligerent rights, meaning that they may, from humane necessity, stand in some respects as independent nations carrying on war. Thus this rule makes what would have been a right to punish immediately for treason or piracy, only a right to hold a party as a prisoner of war. A pirate is *hostis humani generis*, an enemy of the human race, and all nations are called on to go in pursuit of a pirate ship, whether she is operating on the commerce of one nation or all nations, and when her crew are taken, their punish-

ment is death by the law of nations. The *Alabama*, lately sunk by the *Kearsarge* near the coast of France, would have come within the general law against pirates, but for this necessary humane policy that so extends itself that individuals are treated as public enemies, and not as private criminals. These are some instances of things that come within the meaning of this expression. The Alabama could not, however, according to the laws and courtesy of Christian nations, have received any assistance or countenance in her piratical course; and if ever such was done by any nation, it was an offence to all others.

But the doctrine of belligerent rights gives no power to the enemy to take with impunity the property of a citizen or subject of an invaded country; and no sovereign power, even acknowledged by all the world, can give such authority. When Sir William Howe burned the houses of Whigs in Philadelphia, in 1777, he could not have set up in defence the command of his king, or the necessity of war—the very fact of the necessity of war would have made the justification less. If he had come within the reach of a sheriff of Pennsylvania, his plea would have been nothing; and it may be that his master in like predicament would have fared no better.

In 1780, an officer under the orders of Lord Cornwallis, or Lord Rawdon, took from a farmer in South Carolina, negroes, horses, cattle, hogs, &c., and according to military orders had them taken to the British garrison at Camden. He was sued in 1784, and pleaded the orders of his superiors, and that no part of the property was appropriated to his own use; but the court said that his superiors and himself were equally guilty of a trespass: *Whitaker* vs. *English*, 1 Bay's Rep. 14.

Our own generals in a campaign are not allowed to take or to destroy private property, except from *absolute necessity;* and if they do so, they are liable to the private action of the party whose property has been taken or has been destroyed. On this subject see the case of *Mitchell* vs. *Harmony*, 13 Howard's Supreme Court Rep. 115. Where this full necessity exists they will not be trespassers, and the party suffering must look to the government; but if it does not exist they will be trespassers, as will be all who act under their orders, unless there is personal coercion. This case, taking the argument of counsel as well as the court, is the fullest we have in America on this subject. On the general subject of the destruction of property, from neces-

sity, and for the public good, see *Russell* vs. *Mayor, &c., of New York*, 2 Denio 461. There is not much kindred to any facts in this case, but the positions are interesting.

But, to repeat, whoever heard that a nation in time of war and unjust invasion, was bound to sanction or abide by the orders of the generals of the enemy, to appropriate to himself the property of her citizens, or to destroy it, and that rights of property could be taken away by the orders of a foe?

There is no element of which laws are made that can afford such a sanction, or that can combine with any principle to make such a rule.

Hardee was a wrongdoer, and they who went into this pork-packing establishment under his order, were trespassers jointly with him.

But it is contended that Armstrong was not liable, because it is not shown that he had any knowledge of the trespass, and, of course, did not sanction it. These persons composing the firm of E. M. Bruce & Co. evidently went into the rebel lines for the purpose of making money by affording supplies, such as pork, &c., for the rebel army. The firm was of three men; one was at Nashville, another at Clarksville in Tennessee, and the other, E. M. Bruce, was at Bowling Green in Kentucky. Armstrong, who was at Nashville, must naturally have known that Bruce was conducting their business at Bowling Green; and it is about as natural that he should have known that he had superseded the plaintiff in the business, and how he got the use of plaintiff's establishment. But whether he had actual knowledge of the trespass or not, it seems to me that he was responsible. These persons left their homes in a distant part of the state to unite themselves, in some sense, with this body of violence—this rebel army—in the business they were to do; and a tort committed by one of them, such as this was, in connection with their object, should bind the other members of the firm: Story on Partnership, §§ 166, 167, 168; Parsons on Contracts, Vol. 1, page 161, and notes.

The plaintiff says in his petition, he was ready to go on with the same pork-packing business at the establishment, and at the time of the trespass complained of. This is a confession that he was about to devote, or had devoted, the establishment to an unlawful and treasonable purpose; for there was no other to whom he could have sold his pork but this enemy. But it does

not lie in the mouth of E. M. Bruce & Co. to say, that they were justified in the taking of the property by violence, in order that they might supply the same enemy. His conduct would have been for the judgment of his government, and was nothing to the defendants one way or the other.

The principal damages sought to be recovered are for the burning of the house, fixtures, tools, &c., and it is contended in defence, that the damages are too remote, &c. It is true that the destruction of this property did not necessarily result from the violent possession taken of it by E. M. Bruce & Co. If the plaintiff had remained in possession of this property, and had carried on the same business, and for the same object and purpose, the supply of the enemy, there might have been pork in the house when General Mitchell's troops came up, and a burning might have taken place by the order of Hardee, for the same cause that the order was in fact made. But we do not know how the plaintiff would have employed or managed his property at the crisis; whether he would have had a large quantity of pork there or not, so as to invite the burning, or what pains he might have taken, successfully, to save his house, &c. The most, then, we can say, is that it might or might not have been burned, if it had not been taken from him. I think, as a general rule, that in such cases, where such a problem is made by the wrongdoer, the potential fact is to be resolved against him.

This is not really a case of remote and speculative damages, but the question is, whether the fact creating the damages is connected in any form with the wrong of the party, or not. If a trespasser has taken possession of another man's house, and, on account of some spite which a mob may have against him, the house is injured or destroyed, it seems to me there is such a connection between the two acts, that the trespasser would be held liable for the damage done to the house; for, but for his unlawful possession, the harm would not have happened. This case has strong analogy, though the motive was not spite. The motive does not govern. The case of the Balloon in New York illustrates this doctrine very well. Guille went up in a balloon, and accidentally came down in Swan's Garden, and the crowd of people, out of curiosity, and to help him in his difficulty with the balloon, rushed into the garden, and tramped down much that was growing there, and the court held Guille responsible for the damages done by the crowd: 19 Johnston's Rep. 382. It is not necessary

in these cases to show, as in another class, that the damages are the proximate and direct result of the wrongful act; there is connection enough without that. In the case of *King* vs. *Shanks*, 12 Ben. Monroe 415, the doctrine of the responsibility of the wrongdoer for what may happen, not as the direct effect of his wrong, is discussed much at large, and the authorities generally cited. In this case the court makes these very practical remarks; we shall find them useful: "It may be impossible to express in general terms the precise relation which should exist between an illegal act and the ensuing damage, in order to throw the responsibility on the wrongdoer." See also the case of *Munford* vs. *Taylor*, 2 Metcalfe Ky. Rep. 599. The principle that holds bailees liable for casualties to the property which they wrongfully hold after the bailment is terminated, might be applied to this case, and we all know this rule as to bailees.

But let us not forget that these doctrines are not absolutely necessary to be considered in this case. Hardee was a joint trespasser with this firm all the time the place was occupied by them, and they were joint trespassers with him at the time of the burning of the property, as part of the original and continued trespass, and were responsible as much for the damage then done by his order as for the original entry on the premises.

Hardee, when he was about to burn the house, &c., and because he was going to do so, gave to the plaintiff an order for ten thousand pounds of pork, part of which he got out before everything was destroyed. This cannot be considered a satisfaction, but it should be taken in mitigation of damages.

The constitution of this state maintains the ancient mode of trial by jury; and although the General Assembly may change the forum in cases of tort, as in this case, the Court of Chancery may have jurisdiction certainly over the property of some of the parties, yet in this court, as well as in the court of law, a jury must be impannelled to find the amount of damages; for this right cannot be taken away by the legislature.